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No. 06-152

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In The

Supreme Court of the United States

R & F PROPERTIES OF LAKE COUNTY, INC.,

Petitioner,

v.

KARYN L. WALKER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The petition for certiorari filed by R & F Properties of Lake County, Inc. ("R & F") includes a grab bag of arguments and contentions (including many that were not raised in the District Court or the Court of Appeals) which ignore and confuse facts of the case, the import of the Eleventh Circuit's Order and the proceedings below, which make review of this case by this Court inappropriate. Petitioner urges this Court to adopt a position that, in a False Claims Act ("FCA") action, once a court determines that the language contained in the relevant regulation or contract provision allegedly violated by conduct of the defendant is ambiguous, under no circumstances could liability for fraud attach. Under Petitioner's proposed standard, the actual knowledge or understanding of a regulation that can be considered ambiguous in any context by a defendant would be completely irrelevant. Petitioner suggests creation of a bright line rule that, if a provision is found to be ambiguous, regardless of whether an entity has an understanding of the regulation and acts purposefully or knowingly in contravention of that understanding of the regulation in order to obtain money it is not entitled to, no liability would attach.

Not ly does this suggestion fly in the face of the remedial and preventative purposes of the FCA, but if accepted, it could completely eviscerate any force or meaning of the FCA. Further, Petitioner's suggested rule could provide a roadmap for entities or individuals to be able to commit fraud against the United States government without the worry of liability if it can simply be said that the language of the applicable law, rule or regulation is ambiguous to someone in some context. Petitioner's suggested rule can simply not be reconciled with the

purpose of the FCA – to provide a significant deterrence incentive for entities to not commit fraud against the United States government.

Further, the question presented for review, as crafted by Petitioner, is not one that can be addressed given the facts in this matter and the current stage of the litigation. Petitioner's question presented, "Whether liability under the civil False Claims Act, 31 U.S.C. §§ 3729-3733, can be based on a reasonable interpretation of an ambiguous regulation or contractual provision," fundamentally assumes that there is no question of fact as to whether the entity being accused of fraud has a reasonable interpretation of a regulation or contractual provision, and further assumes that the reasonable interpretation or knowledge of the defendant would allow for legal non-fraudulent conduct by the defendant. In other words, the question, as presented, assumes that the entity accused of fraud not only has some reasonable interpretation, but that the reasonable interpretation is in accord with the actions of the entity and that the reasonable interpretation truly suggests that the defendant's conduct is in good faith compliance with what the defendant believes to be allowed by the law, rule or regulation.

In this case, the evidence taken in a light most favorable to Walker (as it must be at this summary judgment stage) suggests that R & F never had any understanding or interpretation of the regulation or contract provision in question other than an interpretation and understanding that would make its conduct of submitting its claims the way it did, fraudulent. Specifically, the evidence presented by Walker suggests that R & F understood the "incident to" provisions of the Medicare guidelines to require certain prerequisites before claiming services as "incident to." In

contrast to that reasonable understanding that R & F had, R & F actually claimed services provided as "incident to" without meeting those prerequisites. Thus, this case cannot even squarely address Petitioner's question raised for review because Petitioner's fundamental assumptions necessary to even get to the question raised are not present. Instead of deciding that fraud could be predicated upon a mere legal dispute as suggested by Petitioner, the Eleventh Circuit here has simply recognized that, if those facts suggested by Walker are believed by a jury, the jury could find that R & F violated the FCA. It is a simple and not so uncommon or remarkable decision and opinion relating to the sufficiency of the evidence at the summary judgment stage of a dispute.

Additionally, even if this case did present a situation where Petitioner's suggested question for review were ripe, Petitioner's urged position is not one that would be appropriate for judicial review. Petitioner is asking this Court to intervene and proscribe the intent of Congress in contravention of the words of the statute. If Congress intended that only the violation of a clear cut law, rule or regulation could provide liability under the FCA, regardless of actual understanding of the law, rule or regulation, Congress would have included such intent in the statute itself. It did not, and neither can this Court.

Clearing up this fundamental confusion as to what the Eleventh Circuit's opinion actually addresses (a not so unique summary judgment motion where a question of fact remains), it also becomes clear that no fundamental Constitutional or common law principles were violated as suggested by Petitioner. The Eleventh Circuit has simply declared that the evidence should go to a jury to determine whether R & F knew that it should have complied with the

prerequisites to the "incident to" provisions of the Medicare guidelines before submitting its claims although it did not do so. R & F will still get its opportunity to present admissible evidence to the jury suggesting that it had a contrary understanding of the regulation. If the jury determines that R & F did not understand the provisions in the manner suggested by Walker, then it will not be held civilly or criminally responsible. However, that is unmistakably a factual issue which the jury must be allowed to decide.

Last, with the understanding that the Eleventh Circuit's decision did nothing more than accept Walker's version of the disputed facts as true and declare that the issue should go to a jury, this case at this stage does not present an issue of fundamental importance such as to warrant the review of this Court. This is a not uncommon case where fraudulent action has been alleged, and a jury should be allowed to determine whether it finds the elements required to establish fraud. Thus, the petition for a writ of certiorari should be denied.

I. THERE IS NO CONFLICT OR CONFUSION AMONG CIRCUIT COURTS WITH RESPECT TO THE DECISION MADE BY THE ELEVENTH CIRCUIT IN THIS MATTER.

Petitioner suggests that there is a conflict among circuit courts relating to the basis for FCA liability specifically suggesting that, in direct conflict with the Eleventh Circuit's opinion in this case, some circuit courts have found that a regulation which is alleged to have been violated by a defendant's conduct cannot be found to be ambiguous in any way if that violation is to be a basis for FCA liability. Instead, a close review of the cases cited by

Petitioner and what those cases actually address indicates that there is no conflict among the circuit courts and that this case is simply one that is not uncommon, which presents a pure factual dispute as to whether the defendant knowingly submitted a false claim.

When a plaintiff or relator in a specific FCA claim action cannot present sufficient evidence to defeat a summary judgment motion to suggest that the defendant knew of the falsity of its claims, certainly summary judgment is appropriate. The Eleventh Circuit in this case found that this is not the case here. Walker did present evidence to suggest that R & F knew of the falsity of its claims. Petitioner ***does not*** challenge the Eleventh Circuit's finding of the existence of a genuine conflict as to the material factual question of R & F's knowledge of the falsity of its submissions of claims. However, Petitioner wants to ignore this issue and have this Court to use this opportunity to convert this pure factual question (whether R & F understood the "incident to" provisions of the Medicare guidelines to include certain requirements) into a legal question and, thus, preclude any factual argument to the jury as to R & F's knowledge.

This approach is wholly unsupported by any legal authority. Several of Petitioner's comments throughout the petition completely ignore this factual dispute and start from an assumption that the factual determination has been resolved ***in its favor***. This is simply not appropriate in summary judgment and is not what the Eleventh Circuit did. Further, there is no case cited by the Petitioner or otherwise found by Respondent to suggest that the mere fact that a judge could look at words and declare them to be ambiguous in some context would be determinative or even important in deciding whether evidence

presented in a specific matter could establish liability under the FCA. Instead, the fact that a statute can be seen to be ambiguous is, and has always been, simply evidence that a defendant might choose to present to a jury when it is asked to determine knowledge of falsity. It has not been held and should be seen to be determinative of a defendant's knowledge – a specific factual element required to be established in order for liability to attach.

A. The Eleventh Circuit's Opinion in This Matter Does Not Address the Issue Petitioner Asks This Court to Review.

As described above, a review of the Eleventh Circuit's opinion reveals that the question Petitioner asks this Court to review is not a question implicated by this case. Petitioner suggests that this matter presents a situation where there is "no dispute that the regulation allegedly violated was ambiguous and that R & F's interpretation of the ambiguous regulation was reasonable." This statement, however, is both inaccurate and misses the point of the Eleventh Circuit's opinion. Even if the ambiguity of the regulation were not disputed, any dispute as to whether R & F's interpretation of the regulation was reasonable or not without addressing R & F's actual interpretation is completely irrelevant. The crux of the Eleventh Circuit's opinion was a determination that Walker had presented sufficient evidence to suggest that R & F's knowledge and interpretation of the regulation and contract provision was exactly the same as Walker's knowledge and understanding, as well as the Medicare community's and the government's understanding, i.e., that certain requirements were mandatory if a Medicare provider wanted to properly submit a claim as "incident

to" the services of a physician. Certainly if that understanding is determined to be R & F's understanding, there is no dispute that it is reasonable. However, unless the factual finding is made as to what R & F's understanding or knowledge was, the reasonableness is of no import to a summary judgment determination.

On the contrary, in the petition, R & F starts from the opposite conclusion, i.e., that its own interpretation of the statute and contract provision were that the specific requirements were not necessary as suggested by Walker and the evidence she presented. Thus, R & F ignores the Eleventh Circuit's decision that the facts must be accepted in a light most favorable to Walker and that those facts support a conclusion that R & F knew that the guidelines set forth the specific requirements suggested by Walker. It is only in ignoring that Eleventh Circuit finding that Petitioner's argument makes sense. However, the Eleventh Circuit's opinions cannot be ignored when analyzing this matter.

Once again, although the Eleventh Circuit stated that the regulation at issue prior to 2002 was ambiguous, it never found that R & F's interpretation of the regulation was that the requirements suggested by Walker and the Medicare community were not in fact requirements. In fact, the Eleventh Circuit properly found that a jury could determine from the evidence that R & F's interpretation was exactly the same as Relator's, the Medicare community's and the United States' interpretation, i.e., that certain criteria were required prior to submitting a claim as "incident to" a physician's services, and that R & F submitted the claims anyway without meeting those criteria. Petitioner continues by claiming that, "the Eleventh Circuit never attempted to challenge the district

court's ruling by arguing that R & F's interpretation of the ambiguous regulation was somehow unreasonable." Instead, the Eleventh Circuit's entire opinion challenged the finding by the district court that R & F's interpretation has been established. The Eleventh Circuit made clear, that, as in any summary judgment case, it would be inappropriate to assume that R & F ever understood the regulation or contract provision to mean anything other than what Walker suggests the regulation and contract provision mean because there is factual evidence that a jury could believe which could support Walker's (the non-moving party's) position.

Yet another example of Petitioner's misunderstanding and confusion of the issues in this case is seen at page 21 of the petition which states that, "[t]he Eleventh Circuit held the case against R & F could go forward since the ***plaintiff could show that she had a reasonable regulatory interpretation***." This comment is quite pointedly and importantly inaccurate. Instead of making some determination that summary judgment is inappropriate because Relator's interpretation of the statute is reasonable, the Eleventh Circuit held that this case can go forward because the Relator can provide evidence ***that Petitioner knew*** the falsity of its claims and that ***Petitioner's understanding*** of the regulation and contract provision was that the requirements should have been met despite Petitioner admittedly not meeting the requirements. The Eleventh Circuit simply commented that if the Petitioner's knowledge is such that the undisputed actions were fraudulent, the ambiguity of the statute is irrelevant.

Thus, although there is another reasonable interpretation of the regulation which, if proven to be the interpretation of the Petitioner, would absolve Petitioner of

liability, at the summary judgment stage, the factual disputes here – a dispute as to what Petitioner actually knew must be resolved in favor of the non-moving party – preclude such an outcome. As explained in the petition, the core of the false claims alleged in this matter revolve around Medicaid regulations allowing physicians to charge for services of non-physician caregivers (nurse practitioners and physician assistants) to Medicaid patients as services "incident to" the services of the physician. This case is about false and fraudulent Medicare claims submitted by R & F, and the facts as set out by Walker establish that R & F knowingly and intentionally represented to the government that certain criteria were met with respect to these services when it knew that the criteria were in fact not met. By falsely certifying that these criteria were met, the government paid out monies to R & F that it would have not otherwise paid had it known that the criteria were not met.

In this matter, R & F does not challenge the Eleventh Circuit's finding that the facts presented by the Relator could be found by a jury to determine that this defendant actually knew that its submissions for reimbursement through the Medicare program were fraudulent. Instead, R & F urges that the determination of that fact remain irrelevant, and suggests that if there is a reasonable interpretation of the law, rule or regulation at issue, regardless of whether it is the defendant's interpretation, a knowing violation of that law rule or regulation cannot support a finding of liability. Not only is this interpretation against the very purpose of the False Claims Act (to prevent knowing fraud) and against the well-established legal principles of allowing a jury to make these factual determinations, Petitioner's suggestion that other Circuits

or District Courts have found other than this is misleading. Thus, the petition filed in this matter should be denied.

B. The Eleventh Circuit's Opinion in This Matter Does Not Conflict With Other Circuit Court Criminal or Civil FCA Opinions.

Petitioner suggests that this Court's review is necessary in this matter because of a conflict in the lower courts regarding "whether, and under what circumstances, an alleged failure to comply with an ambiguous regulation or contract can serve as the basis for a FCA violation." However, a close look at that question suggested by Petitioner that this Court review and the cases cited by Petitioner to support its conclusion that there is a split amongst lower courts reveals that there is, in fact, no split among lower courts on the issue identified. Further, even if there were a split amongst lower courts, review of the Eleventh Circuit's opinion in this case will not resolve the issue identified by Petitioner.

In fact, Petitioner's question, whether liability under the FCA can be based on a reasonable interpretation of an ambiguous regulation or contractual provision, has been uniformly answered by lower courts. The consistent answer is that when a defendant fails to comply with an ambiguous (or an unambiguous) regulation or contract provision, such a failure can serve as the basis for a FCA violation only when knowing submission of a false claim is established. This has been the standard to prove a FCA violation and it has been reiterated and reaffirmed consistently. *See, United States ex rel. Crews v. NCCS Healthcare of Illinois, Inc.*, 460 F.3d 853, 855-856 (7th Cir. 2006); *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139

Fed.Appx. 980, 982 (10th Cir. 2005); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003); *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 413 (6th Cir. 2002); *Minnesota Association of Nurse Anesthetists v. Allina Health Systems*, 276 F.3d 1032 (8th Cir. 2002).

It has further been well-established that the scienter or knowledge element is a question of fact for a jury to determine. *See, United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003); *United States v. President and Fellows of Harvard College*, 323 F.Supp.2d 151, 196 (D.Mass. 2004); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611 (W.D.Wis. 1995). A review of the Eleventh Circuit's opinion sought to be reviewed clearly reveals that it was simply determined, in accord with all known published opinions on this issue, that R & F's knowledge presents a genuine issue of material fact and thus is a triable issue which requires jury determination.

Petitioner suggests that in direct contrast to its description of the Eleventh Circuit's decision in this case, "[o]ther lower courts have adopted the diametrically opposite approach to ambiguity. . . ." and provides citations to cases which it claims stand for the proposition that fraud cannot be predicated on a mere expression of opinion or legal dispute. However, because of the fundamental misunderstanding of the Eleventh Circuit's decision in this matter, each of these cases is inapposite, and none actually conflict with the decisions made in this matter.

Petitioner relies heavily on a case from the Federal Circuit, *Commercial Contractors v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998), to support its contention that

there is a split among the circuits. Petitioner suggests that *Commercial Contractors* conflicts with the Eleventh Circuit opinion in this matter. However, the language highlighted by the Petitioner from *Commercial Contractors* perfectly illustrates the fallacies in Petitioner's position and in fact illustrates that there is no conflict. In *Commercial Contractors,* the Federal Circuit agrees with the Eleventh Circuit, and every other circuit that has squarely addressed this issue, in finding that liability can be appropriate even analyzing a violation of an ambiguous law, rule or regulation, if there is "some specific evidence of knowledge that the claim is false or of an intent to deceive." *Id.* at 1366. Similarly, Petitioner points to *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 Fed.Appx. 980, 984 (10th Cir. 2004), an FCA lawsuit that was dismissed under Rule 12(b)(6) which Petitioner claims stands for the proposition that FCA liability cannot be predicated upon the violation of an ambiguous statute. In *Morton*, the relator had alleged that the defendant made a false claim, i.e., that their son's medical expenses were not covered under the Medicare plan. *Id.* at 981. Relator did not allege that the defendant actually believed that the Morton's son's medical expenses were actually covered under the Medicare plan and that with that knowledge, the defendant made the false statement alleged. In fact, the complaint apparently alleged that A Plus Benefits, Inc., had a specific interpretation of the plan which the Morton's claimed was false. *Id.* at 983. Thus, the Tenth Circuit found that the mere disagreement about the terms of the plan cannot form a basis for False Claims Act liability. *Id.* at 983-984.

Unlike *Morton*, this matter against R & F has been decided by the lower courts at the summary judgment

phase, and the issue has been whether there was sufficient evidence presented to establish that R & F's understanding of the "incident to" provisions of the Medicare scheme was exactly the same as Walker's interpretation, i.e., that the criteria that were admittedly not met by R & F prior to submission of the claims at issue were, in fact, prerequisites in order to properly submit a claim as "incident to" the services of a physician. The Eleventh Circuit found that there was sufficient evidence to establish this as R & F's understanding. Thus, if a jury were to believe the evidence produced by Walker, it could be established that R & F knowingly submitted a claim in contravention of its understanding of the "incident to" provisions of the Medicare guidelines.

Another case cited by Petitioner allegedly supporting its position and allegedly standing for the proposition that no FCA liability can be founded upon the violation of an ambiguous statute is *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996). However, in *Hagood*, the Ninth Circuit stated, "Even viewing Hagood's evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act." *Id.* at 1477. This finding does not support Petitioner's suggestion that a mere factual determination that a regulation is ambiguous should preclude any FCA liability regardless of knowledge. Again, instead, it supports the well-established and uncontroverted standard of requiring evidence at the summary judgment stage to support a conclusion that the claim submitted is false. *Hagood* simply did not present that evidence, and thus summary judgment was granted.

Further, three years later, the Ninth Circuit clarified any misunderstanding in *Hagood* (such as that of Petitioner) in *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999). In *Oliver*, the Ninth Circuit stated:

> *Hagood* does not stand for the proposition that a "reasonable interpretation" of a regulation precludes falsity. *Hagood* involved the question of whether the defendant's submission of allocation costs under the Wather Supply Act gave rise to a false claim under the False Claims Act. In *Hagood*, the statute itself granted discretion in deciding the cost allocation that the plaintiff claimed was false.

Oliver, at 463 (*internal citations omitted*). Therefore, because the law, rule or regulation at issue is not discretionary, *Hagood* is inapplicable to the matter between Walker and Petitioner.

Petitioner also cites cases based on *Hagood*, without further analysis. For example, Petitioner suggests that *United States ex rel. Swafford v. Borgess Medical Center et al.,* 24 Fed.Appx. 491 (6th Cir. 2001), stands for the proposition that FCA liability can never attach over the mere interpretation of a regulation which has been declared ambiguous. The *Swafford* opinion cited is simply an opinion affirming a district court opinion. Further, like *Hagood*, it involved a discretionary determination. In the district court opinion, Swafford argues that the relevant Medicare guidelines relating to the interpretation of venious ultrasounds create a certain standard of care which Borgess Medical Center did not provide prior to requesting reimbursement for those services. The district court found that the guidelines in question were ambiguous even as

described in interpretive manuals which were written to clarify the provisions. *United States ex rel. v. Borgess Medical Center et al.,* 98 F.Supp.2d 822 (W.D.Mich. 2000). Further, the district court found that there was insufficient evidence that a jury could believe to establish that Borgess Medical Center knew that the regulations required a certain standard which it did not provide. *Id.* at 828. Thus, summary judgment was inappropriate. These factual intricacies are in direct contrast to the evidence offered by Walker in this matter which could establish that R & F knew that the "incident to" regulations required certain prerequisites which it did not follow. Thus, neither the *Swafford* district court's opinion nor the Sixth Circuit *Swafford* panel's decision conflicts with the Eleventh Circuit's opinion in this matter.

Petitioner also points to a Seventh Circuit Case, *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999) to establish a split amongst the Circuit Courts. This is yet another case that merely cites *Hagood* and involves a discretionary decision. And again, the facts of *Lamers* do not support Petitioner's suggestion that this Court adopt a bright-line rule that if a statute can be decreed ambiguous in any way, no FCA liability can attach. The *Lamers* opinion insightfully points out that, in discussing the falsity of a claim when addressing a summary judgment motion in an FCA action, it is impossible to avoid the issue of knowledge. *Id.* at 1018. Then, the court looks at all evidence presented in a light most favorable to *Lamers* and concludes that, in that case, there was no evidence which a jury could believe to suggest that the City of Green Bay intended to violate the regulations. At most, the court determined that the relator had evidence of "a handful of technical violations committed by

individual drivers in a complex new busing program", and no evidence that the defendant had knowledge (as required under the FCA) of the falsity of the alleged claims. *Id.* at 1020. Again, this fact pattern is precisely distinct from the facts presented by Walker that could establish R & F's knowledge of the falsity of its claims, and also does not conflict with the Eleventh Circuit's opinion here.

Even the district court case cited by Petitioner, *Luckey v. Baxter Healthcare Corp.*, 2 F.Supp.2d 1034 (N.D.Ill. 1998), does not stand for the proposition Petitioner suggests. The *Luckey* court cites to a District of Minnesota case finding that, "ambiguous statutory requirements, where no regulations further define those requirements, cannot hold a defendant to the government's strict interpretation, so long ***as the defendant's interpretation was reasonable.***" *Id.* at 1049. (*emphasis added.*) The difference between this case against R & F and the case against Luckey is that in *Luckey*, apparently there was no dispute as to what the defendant's interpretation of the statute at issue was. In contrast, here there is a genuine issue of fact as to whether R & F's interpretation of the "incident to" provisions allowed for the conduct that engaged in or whether R & F interpreted the "incident to" provisions as Walker suggests it did, and thus, knew that its conduct was in contravention of those provisions. As *Luckey* once again highlights, courts consistently agree that the defendant's knowledge or understanding is a critical fact. Further, it is axiomatic that if a critical fact is in dispute, summary judgment is inappropriate.

In the final case cited by Petitioner, which supposedly suggests that a determination that a violation of any ambiguous provision can never form the basis for FCA liability, again does not support such a contention. In

Tyger Construction Company, Inc. v. the United States, 28 Fed. Cl. 35 (1993), the Federal Claims Court found that, although fraud cannot be predicated upon the mere expression of an opinion, if facts are established suggesting that a defendant knew that its claims were false, liability could attach. *Id.* at 56. Again, this interpretation is consistent with each of the other cases cited and with the Eleventh Circuit's opinion sought to be reviewed by Petitioner.

In its petition, R & F next lines up several cases which it suggests stand for the proposition that the ambiguity of an allegedly violated law rule or regulation does not automatically cut off the potential for FCA liability and which R & F claim are in direct contrast with the cases cited in the preceding several paragraphs. In describing these cases, R & F aptly describes the reasoning and holdings as emphasizing the fact that the defendant's knowledge and understanding of the ambiguous provision is of central importance. In this respect, Respondent agrees with Petitioner's assessment of those cases. However, what Petitioner misses is the same as what is described above – that there is not a single case presented where any court in the United States has gone as far as Petitioner suggests is appropriate. Because there is a genuine issue of fact as to what R & F's actual knowledge was in this matter, and because none of the cases which Petitioner suggests conflict actually deal with situations where there is no dispute as to the defendant's knowledge or interpretation, it is clear that they do not actually conflict with the Eleventh Circuit opinion here or any other opinion cited by R & F.

Ultimately, after analyzing the cases which Petitioner suggests provide a deep conflict among circuits, it is

apparent that, in fact, there is no conflict among the circuits, but that each factually distinct claim provides for distinct analyses and conclusions. At this stage, the case brought by Walker is not any more remarkable than the myriad of claims brought which uncover schemes of fraud by individuals and entities in an effort to manipulate the Medicare system. The Eleventh Circuit has simply found that it is appropriate to allow this matter to be decided by a jury, and if the jury determines that R & F knowingly submitted false claims, liability will attach. Petitioner suggests that "[o]nly the Supreme Court can end the confusion" and continues by suggesting that "[t]his Court should grant the petition and prevent FCA cases from going forward where the defendant has submitted a claim for reimbursement relying on a reasonable interpretation of an ambiguous regulation or contract." However, from an understanding of the facts in Walker and an analysis of all the case law presented, it is clear that there is no confusion or conflict. The current state of the law will not allow for a case to go forward where a defendant actually relies upon a reasonable interpretation of an ambiguous regulation or contract, even if that interpretation is seen by others to violate that regulation or contract provision. What Petitioner ignores is that in this matter, the evidence in a light most favorable to Walker suggests that R & F's interpretation of the regulation and contract were in conflict with how they actually acted. Thus, review of this matter would not even resolve a conflict, if it existed, in dealing with a factual scenario where it is not disputed that a FCA defendant's interpretation of a regulation or contract provision was such the defendant's actions were at least believed to be in compliance with the regulation or contract provision. Thus, because no conflict exists and because review of this case will not even implicate the

question presented by Petitioner for review, the Petition should not be granted.

C. Petitioner's Suggestion That the Mere Ambiguity of a Law, Rule or Regulation, Without Regard to a Defendant's Knowledge, is Contrary to the Intent of the FCA and Contrary to Requirements of Numerous Fraud Statutes Created by Congress.

If Petitioner's suggestion were accepted and a bright-line rule were declared establishing that a violation of any law, rule or regulation which has ambiguous language can never, as a matter of law, form a basis for fraud liability, not only would the FCA lose any meaning, but numerous other fraud statutes which Congress has enacted could be eroded. For example, Petitioner's suggestion that any statute upon which fraud liability is based must be completely unambiguous in order for a court to be able to go any further and consider actual intent to defraud. However, there are several examples of what can certainly be described as ambiguous statutes which, if violated, are consistently used as a basis for fraud liability or for criminal conviction. For example, the United States Congress has deemed it appropriate to enact laws making "mail fraud," "wire fraud," and "bankruptcy fraud" illegal. *See,* 18 U.S.C. § 157 (2006); 18 U.S.C. § 1341 (2006); 18 U.S.C. § 1346 (2006). These statutes includes words that can certainly be found to be ambiguous under certain circumstances and in certain contexts, but which federal courts have upheld as not unconstitutionally vague and as appropriate statutes upon which fraud convictions can attach. *See, e.g., United States v. Rybicki*, 354 F.3d 124, 143 (2nd Cir. 2003) (Wire fraud and mail fraud statutes

are not too vague or ambiguous to provide a basis for conviction if facts support knowing violation); *United States v. Daniels*, 247 F.3d 598, 600 (5th Cir. 2001) (Bankruptcy fraud statute is not too vague or ambiguous to provide a basis for conviction if facts support knowing violation); *United States v. Bohonus*, 628 F.2d 1167, 1173-1174 (9th Cir. 1980), *cert. den.*, 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1222 (1980) (Mail fraud statute is not too vague to provide a basis for conviction if facts support violation.)

Understanding the context of Petitioner's argument, and understanding the far reaching implications of Petitioner's suggestion, makes clear just how inappropriate adoption of this standard would be. Certainly, the mere fact that the mail fraud statute contains ambiguous terms should not serve as a basis to allow every person ever accused of mail fraud to avoid liability or conviction even if we were faced with an unambiguous confession expressing a specific intent to commit that fraud. However, if this Court were to consider and adopt Petitioner's position, this outcome would extend therefrom.

The bottom line is that, taking away the inaccurate assumptions made by Petitioner and looking at the factual implications and issues that are clearly important in a fraud context, Petitioner's suggested standard in the context of fraud should not be accepted as such. The consistent approach to analyzing both criminal and civil fraud – regardless of the type of fraud – is to look to the factual determination of intent, a factual determination which must be allowed to be made if, as in this case, there is sufficient evidence that this fact is in dispute.

II. PETITIONER'S ARGUMENTS RELATING TO ALLEGED VIOLATIONS OF BASIC CONSTITUTIONAL AND COMMON LAW PRINCIPLES WERE NOT RAISED BELOW AND CANNOT BE ADDRESSED FOR THE FIRST TIME BY THE SUPREME COURT, BUT EVEN IF REVIEWABLE, THE ELEVENTH CIRCUIT'S OPINION HAS NOT IMPINGED UPON THE DUE PROCESS CLAUSE NOR VIOLATED COMMON LAW PRINCIPLES AS PETITIONER SUGGESTS.

In addition to its argument that the Eleventh Circuit's decision deepens existing conflict and confusion among the circuit courts as to the ability to generate FCA liability when confronted with an ambiguous regulation, Petitioner also argues, in its attempt to have this Court grant a writ of certiorari, that the decision below violates the Due Process Clause of the Constitution, as well as certain common law principles. None of these arguments were made by the Petitioner to either the district court or the Eleventh Circuit (including Petitioner's Petition for Rehearing or Rehearing *En Banc*).

This Court ordinarily does not consider or decide in the first instance issues not decided below. *Clingman v. Beaver*, 544 U.S. 581, 598, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 26, L.Ed.2d 142 (1970). Therefore, none of these arguments should be considered by this Court as it determines whether to issue a writ of certiorari.

In the event this Court decides that it will, nonetheless, consider such arguments raised for the first time in Petitioner's petition for a writ of certiorari, the arguments

should be rejected. Because of the same fundamental misunderstanding of the Eleventh Circuit's ruling as it applies to the question of fact as to R & F's knowledge, none of Petitioner's arguments relating to due process, lenity or the rule of construction establish a basis upon which this Court should review this matter.

A. The Eleventh Circuit's Opinion is not Contrary To the Due Process Clause.

Petitioner spends several pages setting forth the standard of due process from the Constitution requiring that punishment should not be doled out unless the person being punished has notice of what he/she is being punished for. In principle, Petitioner's recitation of the application of the Due Process Clause in the civil context, as well as the criminal context, may well be accurate. However, the decision below does not impact any rights of the Petitioner under the Due Process Clause.

Petitioner only reaches its Due Process Clause argument by, again, misstating the holding of the Eleventh Circuit. On page 22 of its petition, Petitioner states that the decision below "violates the fair notice requirement of due process by holding a government contractor liable even if it is unaware of the falsity of its claim due to the regulatory ambiguity." Petitioner contends that it was faced with an ambiguous regulation and, therefore, crafted a reasonable interpretation of that regulation, which interpretation Petitioner claims guided its actions. This is not what Walker's evidence suggests occurred in this matter (which must be accepted as true for purposes of summary judgment) and, as stated above, this is not what the Eleventh Circuit determined. Walker presented

evidence that Petitioner was aware of the falsity of its claims and the court below simply determined that summary judgment was, therefore, inappropriate. To avoid summary judgment, Walker elicited evidence that *Petitioner's own interpretation* was consistent with that of the Medicare community and, therefore, Petitioner's claims, which failed to conform to such interpretation, were fraudulent. If Walker is unable to persuade the trier of fact that Petitioner had such an interpretation, but still acted contrary to such interpretation, i.e., that Petitioner was aware of the falsity, Walker will not prevail. Thus, if a jury determines that R & F did not have notice that its actions would subject it to liability, there will be no liability and no taking will occur to trigger substantive due process review. However, if Walker is successful in carrying her burden of persuasion, and a jury determines that R & F knew that its actions were in contravention of its own knowledge of the Medicare guidelines about "incident to" billing, Walker will prevail and an appropriate judgment will attach. The fact that either outcome is possible means that there has not been a violation of Petitioner's due process rights.

B. The Eleventh Circuit's Opinion is not Contrary to The Rule of Lenity.

Similarly, Petitioner claims that the decision below contravenes the rule of lenity which requires that criminal statutes (and, according to Petitioner, statutes of a penal nature such as the FCA) ensure fair warning by resolving ambiguity to apply only to conduct that is clearly within the reach of the statute. Again, as discussed above, the decision of the Eleventh Circuit can be found to have violated the rule of lenity only if one starts from the inaccurate facts assumed by the Petitioner in its petition.

In this case, at this stage, Walker has elicited evidence that would tend to prove that the Petitioner's assumptions stated in the Petition for a Writ of Certiorari are wrong, and therefore, as stated above, Petitioner had fair notice of the regulation, but still chose to file false claims. In the end, the trier of fact will determine who is correct.

C. The Eleventh Circuit's Opinion is not Contrary to the Principle of Interpreting an Ambiguous Provision Against the Drafter.

Again, the Petitioner's summary of the doctrine of *contra proferentum*, as described in the petition, appears accurate. However, any application of such doctrine to the facts of this matter is unwarranted. The argument would apply only if the facts were that Walker had failed to produce any evidence that showed Petitioner had an understanding of the requirements of the prerequisites necessary to support the claims it filed, but despite that understanding, still knowingly filed false claims. The decision below does not include a determination that the regulation at issue was ambiguous and that Walker and Petitioner simply reached two reasonable but differing interpretations. Had that been the case, it is possible that, were this Court to consider this argument, it might apply. However, as stated above, Walker's evidence is *not* that Petitioner had a second interpretation that differed from Walker's. Rather, her evidence is that Walker and Petitioner (as well as the Medicare community in general) had the same interpretation. Therefore, the doctrine of *contra proferentum* has no application to this matter were the Court to consider this argument in the first place.

IV. THERE IS NO FAR REACHING QUESTION OF EXCEPTIONAL IMPORTANCE IMPLICATED BY THE OPINION OF THE ELEVENTH CIRCUIT IN THIS MATTER WHICH REQUIRES SUPREME COURT REVIEW.

Petitioner further suggests that this case presents an issue of great importance because in Petitioner's estimation, FCA lawsuits are so overused that they provide a "trap for the unwary," and may force a defendant to litigate a lawsuit that it might ultimately prevail upon. Petitioner suggests that the Eleventh Circuit's opinion in this case "prevent[s] early dismissal of these FCA cases grounded on ambiguous regulations and contracts," and that somehow, FCA claims are too easy to prove or survive, forcing innocent defendants to pay large amounts of money to settle cases that should never be allowed to go forward. Petitioner suggests that a way to prevent this perceived abuse is to limit claims under the FCA only to fraudulent claims under unambiguous statutes.

Given the fundamental misunderstandings as described above, these assertions by Petitioner suggesting widespread abuse of the FCA and suggesting the devastating impact of the Eleventh Circuit's opinion in this matter if allowed to stand, paint a very misleading picture as to the ease of filing and prevailing as a relator under the FCA. First, the Eleventh Circuit's opinion in this matter is simply a decision reiterating the well accepted principles of summary judgment reaffirming that knowledge is a question of fact for a jury to determine. The opinion below does not stand for the proposition that FCA defendants can be held liable if their understanding of a law, rule or regulation is, in fact, reasonable and if that reasonable understanding equates to the actions of the defendant

being in good faith. Further, contrary to Petitioner's assertions, the mere fact that companies may have decided to voluntarily settle FCA claims might suggest that the company felt that it did something wrong and might not necessarily be a payoff to avoid the possibility of treble damages and penalties.

Such results are hardly "unfair and legally wrong" as suggested by Petitioner if the result is to repay to the government money that was fraudulently taken, particularly when Congress has expressed its clear intent that this fraud be dealt with by making bad actors pay treble damages and penalties. The "complex regulations and contracts" within the Medicare guidelines are hardly a "trap for the unwary" as suggested by Petitioner, and given the rigors of litigation, it would hardly be plausible to truly believe that a completely innocent company could be hoodwinked into settling a FCA claim for a large sum of money. The exacting standards of Federal Rule 9(b), as well as all the other requirements in place, including summary judgment standards, serve the litigation system well in ensuring that only true disputes as to material facts reach a jury. Simply because this matter happens to present a situation where there is, at the very least, believable evidence that R & F committed fraud, does not turn the Eleventh Circuit's opinion into one which will wreak havoc on all FCA defendants. Certainly, the exacting standards in place, which were created appropriately by Congress, will safeguard against any abuse of the system, and if Congress ever determines that it is appropriate to change the standards, it will do so.

Nothing in the petition for a writ of certiorari establishes a need for this Court to review the not so unusual circumstances in this matter left after the Eleventh

Circuit made a routine finding on a summary judgment issue and determined that a true factual dispute should be determined by a jury.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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